

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
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<b>ROBERT L. AND ROSALYN D. HUTCHINGS</b>	:	DETERMINATION
	:	DTA NO. 818142
for Redetermination of a Deficiency or for Refund	:	
of New York State Personal Income Tax under Article	:	
22 of the Tax Law and New York City Nonresident	:	
Earnings Tax under the New York City Administrative	:	
Code for the Years 1993 and 1994.	:	

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Petitioners, Robert L. and Rosalyn D. Hutchings, P.O. Box 561, Effort, Pennsylvania 18330, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under the New York City Administrative Code for the years 1993 and 1994.

On March 2, 2001, the Division of Taxation, by its representative Barbara G. Billet, Esq. (Jennifer A. Murphy, Esq., of counsel), brought a Motion for Summary Determination seeking dismissal of the petition in the above-referenced matter, pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, on the ground that petitioners failed to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals for an administrative hearing within 90 days after the issuance of four notices of deficiency to petitioners. Petitioners, appearing *pro se*, had 30 days, or until April 2, 2001, within which to respond to the Division's motion. Petitioners did not respond to the Division's motion, and thus the 90-day period for issuance of this order commenced on the April 2, 2001 date on which petitioners' time to serve a

response to the motion expired, pursuant to section 3000.5(d) of the Rules. After review of the motion papers, affidavits and documents submitted therewith, and all pleadings and related documents submitted in connection with this matter, Dennis M. Galliher, Administrative Law Judge, issues the following determination.

### ***ISSUE***

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioners did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals within 90 days after the issuance of four notices of deficiency to petitioners.

### ***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued to Robert L. Hutchings and Rosalyn D. Hutchings (“petitioners”), a total of four notices of deficiency, each dated June 15, 1998. These notices were addressed to petitioners at “P.O. Box 561, 2536 Pawnee Rd., Effort, PA. 18330-0561.” Two of the notices bear assessment identification number L-015105311-8, and two of the notices bear assessment identification number L-015105318-1.<sup>1</sup> The notices assert additional New York State personal income tax and New York City nonresident earnings tax due in the respective aggregate amounts of \$3,114.00 for 1993 and \$3,070.87 for 1994, plus interest.

2. In support of its motion for summary determination, the Division submitted: its answer to the petition; an affidavit of its representative Jennifer A. Murphy, Esq.; affidavits of Geraldine Mahon, James Baisley and Mary Sauter, employees of the Division; copies of the notices of deficiency issued to petitioners; United States Postal Service (“USPS”) forms 3811-A; copies of

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1. As is made clear by the assessment identification numbers, and by paragraph 2 of each notice, an identical notice was sent to each petitioner for each of the two years in issue (i.e., each petitioner was separately assessed for each year in issue).

the first two pages of petitioners' 1995 New York State personal income tax return and amended New York State personal income tax return; a copy of the petition which was received by the Division of Tax Appeals on November 13, 2000; a copy of a handwritten request for petition forms dated July 3, 2000 and received by the Division of Tax Appeals on July 20, 2000, together with a responding letter dated July 21, 2000 indicating that such forms were sent; a copy of a Payment Document stamped as received by the Division on February 29, 2000 indicating petitioners' disagreement with the notices; a copy of the envelope postmarked February 22, 2000 which was used to mail the Payment Document; and a copy of a Conciliation Order Dismissing Request dated May 5, 2000.

3. Geraldine Mahon has, since December 1989, held the position of Principal Clerk of the CARTS ("Case and Resource Tracking System") Control Unit of the Division. In her affidavit, Ms. Mahon describes the Division's general procedure for processing notices of deficiency and notices of determination prior to their shipment to the Division's mechanical unit for mailing.

She receives a computer printout called a certified mail record ("CMR") and the corresponding statutory notices, each predated with the anticipated date of mailing and each notice assigned a certified control number under the heading "Certified No." The CMR, together with the notices listed thereon, are placed in envelopes, are delivered into the possession of the USPS, and the CMR bearing a postmark from the USPS is returned to CARTS for retention among its records. The foregoing is the standard office practice. However, the CMR for June 15, 1998 has been misplaced and is not available for inclusion in the record. Finally, in the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS.

4. The affidavit of James Baisley, Chief Mail Processing Clerk in the Division's Mail Processing Center ("mailroom"), attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a piece of correspondence, including a statutory notice or a conciliation order is placed in the "Outgoing Certified Mail" area in the mailroom, a member of the mailroom staff operates a machine which puts each statutory notice into an envelope, weighs and seals each envelope and places postage and fee amounts on the envelopes. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk also performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR.

A member of the staff delivers the sealed, stamped envelopes to one of the various branch offices of the USPS in the Albany, New York area. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office. The CMR is the Division's record of receipt, by the USPS, for the pieces of certified mail listed on the CMR. In the ordinary course of business and pursuant to the practices and procedures of the Division's mailroom, the CMR is picked up at the post office by member of Mr. Baisley's staff on the following day after its delivery and is then delivered to the originating office (here CARTS).

5. While the CMR is not available and included as part of the record, the notices of deficiency are included. These notices bear, in their upper center section, the respective certified mailing numbers P 911 002 349, P 911 002 350, P 911 002 351 and P 911 002 352.

6. Mary Sauter is employed as a Legal Assistant 1 in the Division's Office of Counsel. As part of her duties, she prepares USPS Forms 3811-A ("Domestic Return Receipt [After

Mailing]”). This form is available to a mailer to request return receipts with respect to registered, certified, insured and express mail after mailing. The Form 3811-A is sent to the USPS post office where the piece of mail in question was delivered, in this case to the Effort, Pennsylvania post office. The USPS employee at that post office, in turn, fills in Form 3811-A based upon delivery records with the name of the individual or organization that received the piece of mail (in box 8) and the delivery date of the piece of mail (in box 9). Box 12 of Form 3811-A is provided for the initials of the USPS postal clerk who records the information on the form. The postmark of the delivery post office is to be placed in box 7.

7. For petitioners, Ms. Sauter prepared a separate Form 3811-A, Request for Return Receipt, for each of the four notices identified by their respective certified mail numbers. Based upon information provided to her by the Office of Counsel, she filled out box numbers 3, 4 and 5 of the forms. On two of the forms she wrote, at box 3, “Hutchings, Rosalyn D., P.O. Box 561, 2536 Pawnee Rd., Effort, PA 18330-0561.” On the remaining two forms she wrote, at box 3, “Hutchings, Robert L., P.O. Box 561, 2536 Pawnee Rd., Effort, PA 18330-0561.” In box 4, she wrote the certified mail numbers for the notices of deficiency in question, assigning one of such numbers to each of the four forms. In box 5, she wrote the mailing date “6/15/98.” She also placed an “x” in box 1 to indicate “Return receipt WAS NOT paid for at time of mailing,” and placed an “x” next to “certified” in box 6.

8. Ms. Sauter mailed the forms 3811-A from the Colonie Center branch of the USPS on December 13, 2000. In turn, she received the forms back from the Effort, Pennsylvania post office, with such delivering post office’s postmark dated December 22, 2000 stamped in box 7. On each form, “Rosalyn Hutchings” was handwritten in box 8 (“Delivered to the following individual, company, or organization”), and the date “6/18/98” was handwritten in box 9

(“Delivery Date”). The USPS clerk’s initials were placed in box 12, and an “x” appears in box 11 of each form indicating that “delivery was made.”

9. Attached to the Division’s motion papers was a copy of the first two pages of petitioners’ 1995 Nonresident Income Tax Return (“Form IT-201”), and the first two pages of petitioners’ Amended Resident Income Tax Return (“Form IT-201-X”). Each of these forms indicates petitioners’ address as “P.O. Box 561, 2536 Pawnee Rd., Effort, PA 18330.”

10. On November 13, 2000, the Division of Tax Appeals received a petition from petitioners. The petition was hand dated June 30, 2000, was signed by petitioners, and contained at paragraph three the following allegation, relevant to the issue of whether a timely protest against the notices had been made:

Jay Robbins, Dave Razzano and Protest Unit, never responded to our request for conciliation which was filed timely (we have the prove [sic]).

11. Attached to the Division’s motion papers is a copy of a Payment Document stamped as received by the Division on February 29, 2000. This document clearly states petitioners’ disagreement with the Division’s position for the years 1993, 1994 and 1995. Also attached to the motion papers is a copy of the envelope in which the Payment Document was mailed, bearing a USPS postmark of February 22, 2000.

12. The Division’s Bureau of Conciliation and Mediation Services (“BCMS”) accepted the Payment Document as a protest and request for a conciliation conference. In turn, BCMS issued a Conciliation Order Dismissing Request (CMS No. 180322) which stated: “The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on June 15, 1998, but the request was not mailed until February 22, 2000,

or in excess of ninety days, the request is late filed.” Accordingly, the Order denied petitioners’ request for a conciliation conference.

13. Petitioner did not respond to the motion filed by the Division.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 681(a) authorizes the Division to issue a notice of deficiency to a taxpayer where a deficiency in personal income tax has been determined. Said section further provides that the notice “shall be mailed by certified or registered mail to the taxpayer at his last known address.”

B. In order to challenge a notice of deficiency, a petition for an administrative hearing must be filed with the Division of Tax Appeals within 90-days after the issuance of the notice (Tax Law § 689[b]). As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services. The time period for filing such a request is also 90 days (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Where a taxpayer fails to file a timely petition or a request for a conciliation conference contesting a notice, the Division of Tax Appeals has no jurisdiction over a matter and is statutorily precluded from hearing the merits of the case (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989; *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). In this case, the earliest document in the record indicating petitioners’ disagreement and protest against the Division’s notices is the Payment Document postmarked February 22, 2000 (*see*, Findings of Fact “11” and “12”). This document was treated by the Division as a request for a conciliation conference. However, it was rejected as not having been filed in a timely manner, i.e., within 90 days after the issuance of the notices.

C. Where, as here, a taxpayer files a protest, but the timeliness of the protest is at issue, the Division has the burden of proving proper mailing of the notices (*Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered to the custody of the USPS (*see, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). The mailing evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*). Petitioners, for their part, have raised no claim that the notices at issue were not mailed, that the address to which the notices were sent was incorrect or that the notices were somehow otherwise improperly mailed, or that they did not in fact receive the notices. Nonetheless, the Division remains under a duty to either establish proper mailing of the notices or, alternatively, to establish that the notices were in fact received by the taxpayers and the date of such receipt.

D. In this case, the Division has introduced adequate proof of its standard mailing procedures, including the assignment of certified mail numbers to each of the notices, through the affidavits of Ms. Mahon and Mr. Baisley, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) notices of deficiency. However, because the CMR was misplaced and is not available, the documents and affidavits in the record do not establish that the general mailing procedures described by Ms. Mahon and Mr. Baisley were followed with respect to the notices issued to petitioners. That is, the Division has



not established, by such affidavits, the actual mailing of the subject notices or the date of such mailing.

E. While the Division has failed to establish the actual date of mailing, it has nonetheless satisfactorily proven the date on which the notices were received by petitioners. The affidavits of the Division's employee, Mary Sauter, together with the forms 3811-A, establish that each of the four notices of deficiency was received by petitioner Rosalyn D. Hutchings on June 18, 1998. Where the exact date of mailing cannot be proved, but receipt of the notices can be established, the 90-day statutory period for filing a protest begins to run from the date of receipt of the notices (*Matter of Green Valley Liquors*, Tax Appeals Tribunal, November 25, 1992). Since the Division established that the notices were received on June 18, 1998, the 90-day protest period commenced on such date. In turn, the 90-day protest period expired thereafter on September 16, 1998.

F. As indicated in Conclusion of Law "B", the Payment Document is the first document the Division received in protest to the notices. It was accepted and deemed a request for a conciliation conference. However, such document was not mailed, as indicated by the postmark on the envelope in which it was mailed, until February 22, 2000, which is far beyond the September 16, 1998 date by which a petition or a request had to have been filed. The 90-day period for filing the petition is absolute and there is no provision in the Tax Law for waiver or extension of such period (*see, Matter of Halperin v. Chu*, 138 AD2d 915, 526 NYS2d 66-0, 661-662, *lv denied and appeal dismissed*, 72 NY2d 938, 532 NYS2d 845; *Matter of Sak Smoke Shop, supra.*)

G. Section 3000.9(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.9[b][1]) provides that a motion for summary determination shall be

granted if the administrative law judge finds that it has been established sufficiently that no material issue of fact exists and that, therefore, the administrative law judge can, as a matter of law, issue a determination in favor of any party. In fact, petitioners did not respond to the Division's motion for summary determination, and therefore, they are deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667,671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). In this regard, petitioners made no allegation that the notices were improperly addressed or mailed, or were not received. Since petitioners offered nothing to contest the facts concerning receipt of the notices, as established by the forms 3811-A, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Petitioners' only claim regarding the timeliness of their protest is the bare assertion that a timely protest was made. While petitioners alleged they have proof to establish such claim, they presented nothing in support thereof. Accordingly, upon all of the proof presented, and pursuant to the foregoing discussion, I conclude that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor. That is, the Division has tendered evidence establishing petitioners' receipt of the notices on June 18, 1998, and there was no protest thereafter within 90 days as required, thus leaving no jurisdiction to address the merits of the underlying notices of deficiency. Accordingly, pursuant to 20 NYCRR 3000.9(b)(1), summary determination will be granted.

H. The Division's motion for summary determination is granted and the petition of Robert L. Hutchings and Rosalyn D. Hutchings is hereby dismissed.<sup>2</sup>

DATED: Troy, New York  
June 21, 2001

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE

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<sup>2</sup> It is noted that petitioners are not entirely without recourse, for they may pay the disputed tax and, within two years from the date of payment, file a claim for refund (Tax Law § 689[c]). If their request for refund is denied, they may then proceed with a timely petition for a hearing contesting the refund denial (*see, Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).